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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 42166
Plaintiff-Respondent,)	
)	KOOTENAI COUNTY
v.)	NO. CR 2009-16183
)	
PRESTON ADAM JOY,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI

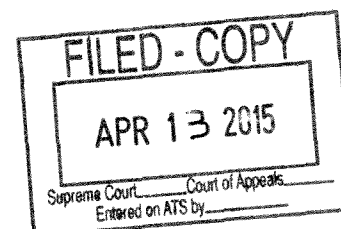
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STATEMENT OF THE CASE

Nature of the Case

After an altercation with his wife, Preston Joy was charged with three felonies: second degree kidnapping, domestic battery, and sexual penetration by a foreign object. He exercised his right to a jury trial, and the jury found him guilty of domestic battery, found him not guilty of sexual penetration by a foreign object, and hung on the kidnapping charge. Mr. Joy later entered a conditional guilty plea to the kidnapping charge. Mr. Joy then appealed, and the Idaho Supreme Court vacated his conviction and remanded his case for a new trial.

After Mr. Joy's new trial, the jury found him guilty of domestic battery and not guilty of kidnapping. The district court then imposed a unified sentence of ten years, with nine years fixed. On appeal, Mr. Joy asserts that the district court erred when it denied his motion to dismiss the charging document for being legally insufficient, abused its discretion when it excluded his surrebuttal evidence, and erred when it failed to give the jury a unanimity instruction.

Statement of the Facts and Course of Proceedings

In 2009, Mr. Joy and his wife, Jennifer, had been together for about fifteen years, and had been married for almost nine years. (Tr., p.205, Ls.2-6; p.339, L.16 – p.340, L.3.)¹ Mr. Joy was working for Dewdrop Sprinkler and Landscape out of Spokane, Washington. (Tr., p.340, Ls.6-9.) Mr. Joy testified that he got off work around 1:30 p.m. one day, had lunch in Hauser, and then went to Post Falls and Coeur d'Alene before returning to his home north of Hauser Lake. (Tr., p.340, L.11 – p.341, L.25.) He had suffered a back injury which led him to get off work at 1:30 p.m. on that day. (See

Tr., p.460, Ls.6-15.) When he got home, Mrs. Joy smacked him. (Tr., p.342, Ls.1-15.) He was not surprised that his wife was upset, because when he went to Coeur d'Alene, he met with his girlfriend who he had been texting that afternoon. (Tr., p.342, L.16 – p.343, L.15.) It appeared to Mr. Joy that Mrs. Joy had been drinking. (Tr., p.346, L.14 – p.347, L.8) Mr. Joy tried to keep his distance from her and eventually worked his way into the house. (Tr., p.343, L.16 – p.344, L.10.) Mrs. Joy went into their bedroom, and he followed. (Tr., p.344, Ls.10-14.)

Mr. Joy testified that Mrs. Joy then berated him about texting his girlfriend, and he let her blow off some steam before he went into the bedroom's walk-in closet to pack a bag. (Tr., p.344, L.15 – p.345, L.8.) They talked while he packed, and then she kneed him in the mouth. (Tr., p.346, Ls.2-13.) After that, she grabbed a shelf for support and started to stomp on and kick him. (Tr., p.347, Ls.9-21.) Mr. Joy conceded that he kicked back because he wanted her away from him. (Tr., p.347, L.24 – p.348, L.2.) When she began flailing at him, he shoved her, went out of the bedroom to the deck, and then made his way into the yard. (Tr., p.348, Ls.18-24.) After a couple of minutes, Mrs. Joy came out with a cut-glass coaster in her hand, and then she tripped over a chaise lounge on the deck and fell down the steps. (Tr., p.348, L.25 – p.349, L.23.) She then threw the coaster at Mr. Joy, but missed because he ducked it. (Tr., p.350, Ls.15-23.)

Mr. Joy testified that Mrs. Joy then came running straight towards him. (Tr., p.350, L.23 – p.351, L.1.) He believed his wife was going to try kicking or hitting him again, so he grabbed her arms and threw her up and over him. (Tr., p.357, Ls.11-25.) She was flung over a low fence and landed at the bottom of an embankment in

¹ The Transcript on Appeal in this case consists of two volumes.

some shrubbery. (Tr., p.351, Ls.4-8; p.355, L.20 – p.356, L.14; p.358, Ls.1-6.) Mrs. Joy yelled at Mr. Joy and tried to climb up the embankment, and Mr. Joy left in his truck. (Tr., p.358, L.7 – p.359, L.12.)

Mr. Joy testified that, after waiting about forty minutes, he went back to the house to get his things from the bedroom. (Tr., p.360, L.16 – p.361, L.18.) Mrs. Joy's disposition had mellowed, and her tone was apologetic as she talked to him while he packed his belongings. (Tr., p.362, L.25 – p.363, L.19.) After he tried to leave again in his truck, he and his wife talked in the truck for about ten minutes, and then Mr. Joy went back into the house with her. (Tr., p.367, Ls.9-21.) Mrs. Joy continued to drink and talked to him for another fifteen minutes, and then Mr. Joy went to sleep. (Tr., p.368, Ls.9-19.) He was then awakened by two Kootenai County Sheriff's Department deputies. (Tr., p.368, Ls.20-24.)

Mr. Joy was charged with three felonies: second degree kidnapping, domestic battery, and penetration with a foreign object. (R., p.39.) After a jury trial, the jury found Mr. Joy guilty of domestic battery and not guilty of sexual penetration by a foreign object, but it did not reach a verdict on the kidnapping charge. (R., 41.) The State sought a new trial on the kidnapping charge, but before the scheduled date of that trial, Mr. Joy entered into a plea agreement with the State. (R., p.41.) Mr. Joy agreed to enter a conditional *Alford* plea,² and the State stipulated to concurrent unified sentences for kidnapping and domestic battery, of no more than fifteen years with ten years fixed. (R., p.41.) Mr. Joy expressly reserved the right to appeal all the district court's rulings before, during and after the trial, the verdict, and any procedure and ruling leading up to the verdict or sentence. (R., p.41.) The district court accepted the plea agreement and

² See *Alford v. North Carolina*, 400 U.S. 25 (1970).

agreed to be bound by it. (R., p.41.) The district court then imposed a unified sentence of fifteen years, with ten years fixed, for kidnapping, and a concurrent unified sentence of ten years fixed for domestic battery. (R., p.41.)

Mr. Joy filed a timely appeal. (R., p.41.) He also filed a Motion for Reconsideration of Sentence Pursuant to I.C.R. 35. (R., pp.20-21.) After a telephonic hearing, the district court denied Mr. Joy's Idaho Criminal Rule 35 motion. (R., pp.27-30.)

On review, the Idaho Supreme Court vacated Mr. Joy's judgment of conviction and remanded his case for a new trial. (R., pp.38-59 (*State v. Joy*, 155 Idaho 1 (2013).) The Idaho Supreme Court concluded: "Because the district court erred by admitting evidence of Preston's prior misconduct, we vacate the judgment of conviction and remand for a new trial on the remaining charges of domestic battery and kidnapping."³ (R., p.59.)

³ The Idaho Supreme Court held that the district court erred in refusing to give Mr. Joy's requested jury instructions on lesser included offenses. (R., pp.42-45.) The Court also held that the district court erred in admitting evidence concerning four prior incidents in which Mr. Joy allegedly abused his wife, because the evidence was not relevant for a permitted purpose under Idaho Criminal Rule 404(b). (R., pp.45-49.) Additionally, the Court held that the district court abused its discretion in quashing Mr. Joy's subpoena *duces tecum* to obtain sexually explicit images from Mrs. Joy's computer that he believed would impeach her, because the district court failed to act consistently with the applicable legal standards. (R., pp.51-52.)

The Court also addressed several evidentiary rulings made by the district court. The Court held that the district court erred in admitting Mrs. Joy's preliminary hearing testimony as prior consistent testimony under Idaho Rule of Evidence 801(d)(1)(B), because Mrs. Joy's motive to lie arose prior to the preliminary hearing. (R., pp.53-54.) The Court also held that the district court erred in permitting the State to introduce out-of-court statements made by Mrs. Joy to Detective Marsh, because the detective's testimony was not admissible under Idaho Rule of Evidence 806 to rehabilitate her credibility. (R., pp.54-55.) Further, the Court held that the district court erred in admitting a boot lace into evidence, because the State failed to sufficiently authenticate it. (R., pp.55-56.) Additionally, the Court held that the district court erred in allowing the State to improperly cross-examine Mr. Joy outside the scope of direct examination, and

After the Idaho Supreme Court issued its remittitur, the district court scheduled the case for another trial. (R., p.65.) The State filed a Motion to Amend the Information. (R., p.71.) At the hearing on the State's motion to amend the Information, Mr. Joy asserted that the domestic battery count in the proposed Amended Information did "not allege any facts whatsoever as to how the crime[] occurred or what the State intends to prove so that we can prepare a defense." (Tr., p.14, L.23 – p.15, L.4.) The domestic battery count did not indicate under which subsection Mr. Joy allegedly committed a battery, "and there's no language that helps narrow it down so we can tell from the language what subsection it is." (Tr., p.15, Ls.11-16.) Those facts were necessary to prepare Mr. Joy's defense, and the specific allegations would also affect the district court's evidentiary rulings. (Tr., p.15, Ls.16-20.) He therefore requested that the district court deny the motion to amend until the State added specifying language. (Tr., p.15, L.24 – p.16, L.1.)

However, the district court granted the State's motion to amend. (Tr., p.19, L.13.) The Amended Information charged Mr. Joy with kidnapping in the second degree, felony, in violation of Idaho Code §§ 18-4501, 18-4503, and 19-2520B, and domestic violence, felony, in violation of I.C. §§ 18-903, 18-918, and 19-2520B.⁴ (R., pp.123-25.)

In his subsequent Motion to Reconsider Amendment of Information, Mr. Joy included, in the alternative, a Motion to Dismiss the Amended Information for being legally insufficient. (R., pp.133-34.) Mr. Joy noted that "[f]ailure to include specific factual allegations in a complaint violates the Due Process clause of the U.S.

in allowing the State to improperly cross-examine Mr. Joy about another witness's testimony because the questioning called for speculation. (R., pp.56-58.)

Constitution and Article I, § 13 of the Idaho Constitution.” (R., pp.133-34.) He asserted that failure to specify the facts upon which a crime is charged also implicated due process concerns. (R., p.134.) Mr. Joy continued: “[I]f the Court allows the State to proceed without specifying the factual aspects of the crime, the defendant moves to dismiss as the Information is legally insufficient as set forth above.” (R. p.134.)

The district court determined that the sufficiency of the language in the Amended Information was not grounds for dismissal. (Tr., p.24, Ls.7-9.) The district court determined that “both sides know exactly what the facts are because, unlike many cases, not all cases have a preliminary hearing.” (Tr., p.24, Ls.11-13.) The case had both a preliminary hearing and a previous trial, “so there can be no doubt about what is to be tried.” (Tr., p.24, Ls.13-16.) According to the district court, “The facts essential to establish the offense of domestic battery are set forth with requisite specificity, and I am unable to locate even a shred of prejudice to the defense.” (Tr., p.26, Ls.3-6.)

The case proceeded to a jury trial. (R., pp.266-93.) Mrs. Joy had a different account of what happened on the day of the altercation. She testified that after Mr. Joy got home from work that day, they got into an argument over him texting his ex-girlfriend. (Tr., p.208, Ls.3-13.) After they argued for about half an hour, Mr. Joy pushed her into the master bedroom’s bathtub, which was full of cold water. (Tr., p.208, L.21 – p.209, L.20.) According to Mrs. Joy, her husband pushed her head into the water, pulled her hair, and hit her in the face with his fist and with the palm and back of his hand. (Tr., p.209, L.21 – p.211, L.12.) He then drained the water, took off her

⁴ The Amended Information also charged Mr. Joy with a great bodily injury sentencing enhancement pursuant to I.C. § 19-2520B. (R., p.124.) Upon the State’s motion, the district court later dismissed the sentencing enhancement. (R., pp.159-162.)

clothes, and tied her wrists behind her back. (Tr., p.211, L.17 – p.212, L.18.) He pushed her over and tied her left ankle to her wrist. (Tr., p.213, Ls.1-4.)

Mrs. Joy testified that Mr. Joy then dragged her from the bedroom outside to his truck, hit and kicked her, and took her to the back of the property. (Tr., p.213, L.14 – p.216, L.12.) When he stopped the truck, he pulled her hair, hit and kicked her, and told her that he would tie her to a tree if she did not tell him where his keys and phone were. (Tr., p.217, L.13 – p.218, L.22.) When she told him, he calmed down, took her back to the house, and went to sleep. (Tr., p.220, Ls.3-19.) Mrs. Joy waited for him to fall asleep and then called 911. (Tr., p.221, Ls.2-5.) She spoke to a deputy when the police arrived, and then saw Dr. Russo at the hospital. (Tr., p.221, L.17 – p.222, L.11.)

Mrs. Joy testified that, after the altercation, she had difficulty breathing, bruised ribs, and pain in her wrists (mainly the left one). (Tr., p.222, L.13 – p.223, L.15.) Her dental bridge fell out in pieces a few days later. (Tr., p.223, L.16 – p.225, L.7.) She also had multiple bald spots and lumps on her head. (Tr., p.225, Ls.17-20.) Further, she had bloody lips from when Mr. Joy shoved a towel in her mouth when he was dunking her head under the water, and bruising on her legs. (Tr., p.228, L.9 – p.230, L.6.) Mrs. Joy had circular indentations around her left wrist for a month, and around her left ankle for six months. (Tr., p.227, Ls.2-14.) Her left wrist was still numb. (Tr., p.226, Ls.1-13.)

On cross examination, Mrs. Joy testified that Mr. Joy had told her he was going to break off the relationship with his girlfriend, but he had not done so. (Tr., p.235, Ls.2-9.) She left a message for him to come home that night, and drank and got angrier at the situation while she waited for him, but she maintained that she only drank three glasses of wine. (Tr., p.235, L.10 – p.236, L.5.) When informed that she had testified at

an earlier court proceeding that Mr. Joy asked her about his keys and phone when he pushed her head into the bathtub, she testified that he did not ask about the keys and phone at that point. (Tr., p.237, L.24 – p.239, L.23.) She had also previously testified that there was still water in the tub when her clothes were removed. (Tr., p.250, Ls.20-24.) Further, Mrs. Joy testified she had previously testified that after Mr. Joy removed her clothes, he left the bathroom and came back with a washcloth. (Tr., p.252, Ls.3-16.)

Detective Shardell Ellis with the Kootenai County Sheriff's Department testified that, when she responded to the scene, she did not see any facial injuries or other injuries on Mr. Joy. (Tr., p.260, L.7 – p.262, L.24.) Mrs. Joy had a bruise forming under her right eye, bloody lips, bruising on both arms, a scrape on her right shin, red ligature marks on her wrists and left ankle, and other injuries. (Tr., p.266, L.20 – p.267, L.12.)

Dr. Anthony Russo, an emergency physician at Kootenai Medical Center, testified that he had seen bruises and ligature marks in his career. (Tr., p.272, L.12 – p.274, L.16.) The day after the alleged incident, he saw Mrs. Joy in the emergency room. (Tr., p.275, Ls.10-14.) During their interview, Mrs. Joy told him she had been bound, struck several times, put into a tub of water, and had a cloth stuffed in her mouth. (Tr., p.276, Ls.14-24.) He described the injuries depicted in photographs taken of Mrs. Joy on that date, and opined that the bruises and ligature marks looked fairly fresh and had been inflicted within a 24-hour period. (Tr., p.277, L.22 – p.282, L.25.) On cross-examination, Dr. Russo testified that many of the injuries depicted in the photographs were also consistent with falling on rocks or being scratched by shrubbery. (Tr., p.285, L.6 – p.289, L.20.)

During the trial, Mr. Joy gave his account of what happened on the day of the altercation. On cross-examination, he testified that, when Mrs. Joy kicked him in the

mouth, his teeth tore up the inside of his mouth below his lip. (Tr., p.392, Ls.6-23.) He initially stated that the injury was not visible in a photograph of him taken the day after the alleged incident, but upon closer examination he stated that it was visible in the photograph. (Tr., p.397, L.12 – p.399, L.13.) While he had previously testified that the injury was visible, at the trial he testified that it was barely visible at first and became more prominent later. (Tr., p.396, L.13 – p.400, L.25.) He did not tell anybody about the mouth injury when he spoke to the police at the scene or when he was booked into jail. (Tr., p.402, L.24 – p.403, L.8.) Mr. Joy also testified on cross-examination that he had bruises on his legs and hips that became visible after a few days. (Tr., p.403, L.12 – p.404, L.5.) He did not tell the officers about his leg injuries. (Tr., p.407, Ls.2-7.)

During the State's rebuttal, Michael Hart, a senior deputy with the Kootenai County Sheriff's Department Jail Division, testified that physical injuries are inquired into and documented during the booking process. (Tr., p.444, L.4 – p.445, L.25.) He had booked Mr. Joy into jail, and Mr. Joy told him that he was not injured, his physical condition was good, and he was able to move without assistance. (Tr., p.446, L.12 – p.447, L.21.) Deputy Hart did not have any records showing that Mr. Joy had any injuries when he was booked, and he did not notice any injuries to Mr. Joy's face. (Tr., p.447, L.22 – p.448, L.9.)

Mr. Joy subsequently asked to put on surrebuttal evidence, in response to Deputy Hart's rebuttal evidence, that Mr. Joy had suffered a back injury which led him to get off work at 1:30 P.M. on the day of the altercation. (Tr., p.460, Ls.6-15.) The surrebuttal evidence would show that Mr. Joy did not reveal any injuries because he was not engaged in the booking process, not because of guilt or innocence. (Tr., p.460, Ls.15-22; p.463, L.16 – p.464, L.11.) The district court excluded the surrebuttal

evidence on Mr. Joy's back injury because it did not address a new matter and Mr. Joy could have introduced the evidence in his case in chief. (Tr., p.466, Ls.2-20.)

The jury found Mr. Joy guilty of domestic battery with a traumatic injury. (R., pp.294-95.) The jury found Mr. Joy not guilty of second degree kidnapping or the lesser included offense of false imprisonment. (R., p.294.)

At the sentencing hearing, the State recommended a unified sentence of ten years, with seven years fixed. (R., p.328.) Mr. Joy recommended a unified sentence of nine-and-one-half years, with four-and-one-half years fixed. (R., p.328.) The district court went beyond the parties' recommendations and imposed a unified sentence of ten years, with nine years fixed. (R., pp.329, 335-36.)

Mr. Joy filed a Notice of Appeal timely from the district court's Sentencing Disposition and Notice of Right to Appeal. (R., pp.337-41.)

ISSUES

1. Did the district court err when it denied Mr. Joy's Motion to Dismiss the Amended Information for being legally insufficient, because the Amended Information did not comply with due process?
2. Did the district court abuse its discretion when it excluded Mr. Joy's surrebuttal evidence?
3. Did the district court err when it failed to give the jury a unanimity instruction?

ARGUMENT

I.

The District Court Erred When It Denied Mr. Joy's Motion To Dismiss The Amended Information For Being Legally Insufficient, Because The Amended Information Did Not Comply With Due Process

A. Introduction

Mr. Joy asserts that the district court erred when it denied his motion to dismiss the Amended Information for being legally insufficient, because the Amended Information did not comply with due process. The Amended Information did not give Mr. Joy notice of the facts giving rise to the domestic battery offense or the means by which he allegedly committed the crime. Further, the lack of notice prejudiced Mr. Joy.

B. Standard Of Review And Applicable Law

Whether a charging document conforms to the requirements of the law is a question of law, over which an appellate court exercises free review. *State v. Severson*, 147 Idaho 694, 708 (2009).

The Idaho Constitution guarantees that “[n]o person shall be held to answer for any felony or criminal offense . . . unless on presentment or indictment of a grand jury or on information of the public prosecutor.” Idaho Const. art. I § 13. “Because the charging document is the instrument that confers subject matter jurisdiction on a court, whether a court has subject matter jurisdiction depends on whether the charging document is legally sufficient.” *Severson*, 147 Idaho at 708.

To be legally sufficient, a charging document must impart jurisdiction and satisfy due process. *Id.* (citing *State v. Quintero*, 141 Idaho 619, 621 (2005)). Due process of law is guaranteed by the United States Constitution and by the Idaho Constitution. U.S. Const. amend. IV § 1; Idaho Const. art. I § 13. “The Sixth Amendment [to the United

States Constitution] and basic principles of due process guarantee a criminal defendant the fundamental right to be informed of the nature and cause of the accusations against him so that he may have a meaningful opportunity to prepare an adequate defense against every issue raised by those accusations.” *State v. Abdullah*, ___ Idaho ___ 2015 WL 856787, at *63 (2015) (internal quotation marks omitted). An information “satisfies due process, when, among other things, it contains factual specificity adequate to enable a person of common understanding to know what is intended and to shield against double jeopardy.” See *Severson*, 147 Idaho at 708 (quoting *State v. Jones*, 140 Idaho 755, 757 (2008) (internal quotation marks omitted); see also *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) (“No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.”)).⁵

In other words, due process under the Idaho and United States Constitutions requires that an information “be specific enough to ensure that the defendant has a meaningful opportunity to prepare his defense and to protect the defendant from a subsequent prosecution for the same act. See *Severson*, 147 Idaho at 709; see also *Russell v. United States*, 369 U.S. 749, 763-64 (1962) (discussing how two of the criteria by which the sufficiency of an indictment is to be measured are (1) whether the indictment contains the elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet, and (2) in case any other proceedings are taken against the defendant for a similar offense, whether the record

⁵ Idaho statutes and the Idaho Criminal Rules also require factual specificity in a charging document. See e.g., I.C. § 19-1409; I.C.R. 7(c).

shows with accuracy to what extent he may plead a former acquittal or conviction). An information “must do more than simply state the offense charged. . . . It must also clearly indicate the facts giving rise to the offense or the means by which the defendant committed the alleged crime.” See *Severson*, 147 Idaho at 709.

C. The Amended Information Did Not Comply With Due Process Because It Did Not Give Mr. Joy Notice Of The Facts Giving Rise To The Domestic Battery Offense

Mr. Joy asserts that the Amended Information did not comply with due process because it did not give him notice of the facts giving rise to the domestic battery offense or the means by which he allegedly committed the crime.

Objections to an information on grounds of due process are waived if not raised before trial. See *id.* at 708. Mr. Joy specifically raised a due process objection under the Idaho and United States Constitutions to the Amended Information before trial (R., pp.133-34), so this issue is not waived.

The Amended Information did not give Mr. Joy notice of the facts giving rise to the offense or the means by which he committed the alleged crime. The domestic battery count in the Amended Information simply alleged:

That the defendant, PRESTON ADAM JOY, on or about the 29th day of July, 2009, in the County of Kootenai, State of Idaho, did, in committing a battery, inflict a traumatic injury upon the person of Jennifer Joy, and where Jennifer Joy and the defendant are household members, all of which is contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the People of the State of Idaho.

(R., p.124.) The Amended Information does not contain anything specifying the facts giving rise to the alleged domestic battery, nor does it not contain anything specifying the means by which Mr. Joy committed the alleged domestic battery. As Mr. Joy explained to the district court (Tr., p.15, Ls.11-16), the domestic battery count did not

indicate under which subsection he allegedly committed a battery. The felony domestic battery statute uses the definition of "battery" from I.C. § 18-903. I.C. § 18-918(2)(a). That section has three definitions for battery: "(a) Willful and unlawful use of force or violence upon the person of another; or (b) Actual, intentional an unlawful touching or striking of another person against the other; or (c) Unlawfully and intentionally causing bodily harm to an individual." I.C. § 18-903. By not indicating under which subsection the alleged battery fell, the Amended Information did not specify the facts giving rise to the alleged domestic battery or the means by which Mr. Joy allegedly committed the offense. See *Severson*, 147 Idaho at 709. Thus, the Amended Information did not comply with due process. See *id.* at 708-09.

D. Mr. Joy Was Prejudiced By The Lack Of Notice From The Amended Information

Mr. Joy asserts that he was prejudiced by the lack of notice from the Amended Information. "[A] defendant generally cannot be prejudiced by the absence of specific details in the information when those details are either already known to the defendant or are provided to him by means other than the information, such as through preliminary hearing testimony." *State v. Jones*, 140 Idaho 41, 46 (Ct. App. 2003) (citing *State v. Owen*, 129 Idaho 183, 190 (Ct. App. 1997); *State v. Holcomb*, 128 Idaho 296, 300 (Ct. App. 1995)).

As the district court noted, Mr. Joy had a preliminary hearing and a previous trial. (See Tr., p.24, Ls.13-16.) Whether a defendant is not prejudiced by the absence of specific details in the information because those details were provided to him at an earlier trial appears to be a question of first impression in Idaho. *Cf. Jones*, 140 Idaho at 46 (holding that the defendant was not prejudiced by any lack of notice in the information because the preliminary hearing gave him notice of the details of the

charges against him). However, this case is distinguishable from cases in some other jurisdictions where the courts held that a defendant was not prejudiced because the defendant had notice from a previous trial. For example, in *Koza v. State*, 756 P.2d 1184 (Nev. 1988), the Nevada Supreme Court held that a defendant was not prejudiced by the charging document's failure to reveal that the State intended to proceed on alternative theories at the defendant's second trial, because the State proceeded against the defendant on the alternative theories at her first trial, *and* "[a] Supplemental Information was filed revealing the prosecution's intent to proceed on those theories." *Id.* at 1185-86. Unlike in *Koza*, in this case the State did not file a supplement to the Amended Information giving notice of the specific facts giving rise to the domestic battery charge.

Similar to *Koza*, in *Commonwealth v. Conefrey*, 650 N.E.2d 1268 (Mass. 1995), the Supreme Judicial Court of Massachusetts held that an indictment which did not specify the dates and times of the alleged incidents did not prejudice a defendant at his second trial, because the defendant had the benefit of the State's evidence at the first trial *and* the defendant did not assert that he would have conducted his defense differently had the specific dates and times been included. *Id.* at 1270 n.6. Unlike *Conefrey*, in this case Mr. Joy implied that he would have conducted his defense differently had the specific facts been included. During the motion to amend hearing, Mr. Joy asserted that the specific facts underlying the domestic battery charge should be included because the count did not indicate under which subsection the alleged battery occurred, where there were three different ways to commit a battery. (Tr., p.15, Ls.11-16.) Further, the subsection under which the alleged battery occurred would affect the district court's evidentiary rulings. (Tr., p.15, Ls.17-20.) Mr. Joy therefore

suggested that, to “prepare a defense,” he would have prepared differently based on the specific facts relied upon by the State. (See Tr., p.15, Ls.11-20.) Thus, Mr. Joy implied that he would have conducted his defense differently had the specific facts been included.

In short, although Mr. Joy had an earlier trial, because the State did not file a supplement to the Amended Information giving notice of the specific facts giving rise to the domestic battery charge, and because Mr. Joy implied that he would have conducted his defense differently had the specific facts been included, he was prejudiced by the lack of notice from the Amended Information.

Thus, the district court erred when it denied his motion to dismiss the Amended Information for being legally insufficient, because the Amended Information did not comply with due process. Mr. Joy’s conviction for domestic battery should therefore be reversed, and the charge dismissed. See *United States v. Zvi*, 168 F.3d 49, 55 (2d Cir. 1999).

II.

The District Court Abused Its Discretion When It Excluded Mr. Joy’s Surrebuttal Evidence

A. Introduction

Mr. Joy asserts that the district court abused its discretion when it excluded Mr. Joy’s proffered surrebuttal evidence, because evidence does not become inadmissible for rebuttal or surrebuttal merely because it could have been presented during a party’s case in chief. In his direct examination, Mr. Joy testified that Mrs. Joy hit him (Tr., p.342, Ls.7-15), kneed him in the mouth (Tr., p.344, L.9 – p.347, L.13), and kicked and stomped on him (Tr., p.347, Ls.9-21). On cross examination, Mr. Joy

testified that, when Mrs. Joy kicked him, it pushed the tissue below his lip into his teeth, cutting the inside of his mouth. (Tr., p.392, Ls.9-21.) He testified that it caused some swelling, but he did not know if the injury was visible to someone looking at him. (Tr., p.396, Ls.1-10.) In an earlier proceeding, Mr. Joy had testified that the injury was visible on the outside of his face. (Tr., p.396, Ls.18-19.) He clarified on cross examination that it was visible from the outside after a couple of days or a period of time. (Tr., p.396, L.21 – p.397, L.11.) Mr. Joy did not tell the police about the injury at his home or when he was booked into jail. (Tr., p.402, L.24 – p.403, L.8.) Defense counsel did not inquire into the mouth injury on redirect examination. (See Tr., p.436, L.13 – p.439, L.12.)

During rebuttal, the State called Deputy Michael Hart with the Kootenai County Sheriff's Department Jail Division, who testified that when he booked Mr. Joy into jail, Mr. Joy stated that he was not injured, his physical condition was good, and he was able to move without assistance. (Tr., p.444, L.4 – p.447, L.21.) Deputy Hart also testified that, when he photographed Mr. Joy, he did not note any injuries to Mr. Joy's face. (Tr., p.448, Ls.1-9.)

For the offer of proof on surrebuttal, defense counsel informed the district court that Mr. Joy had testified at a previous hearing that he had a back injury, and asserted that it was relevant that he had not reported the back injury either. (Tr., p.460, Ls.9-14.) The back injury was why Mr. Joy went off work at 1:30. (Tr., p.460, L.15.) The State argued that the proper time to introduce that evidence was during redirect examination, and so surrebuttal evidence on a back injury should be excluded. (Tr., p.461, Ls.6-19.)

The district court, based on *Walker v. Distler*, 78 Idaho 38 (1956), stated, "Surrebuttal evidence should be permitted when necessary to allow a party to meet a

new matter raised during rebuttal, and I'm having a real difficulty understanding why it's a new matter." (Tr., p.463, Ls.5-12.) Defense counsel asserted that the new matter was the booking process as described by Deputy Hart, and that if Mr. Joy did not mention the back injury because his mind was on other things or he was not engaged in the process, his failure to mention the injury had nothing to do with guilt or innocence. (Tr., p.463, L.16 – p.464, L.1.) The back injury was enough to cause Mr. Joy to leave work early that day, and was proof that he did not mention the injuries because he was not engaged in the booking process. (Tr., p.464, Ls.1-6.) In response, the State repeated its argument that the evidence of the back injury was not proper surrebuttal evidence because the issue could have been addressed during the defense case in chief, and the evidence from Deputy Hart was not new evidence. (Tr., p.464, Ls.13-22.)

The district court then denied the request to present surrebuttal. (Tr., p.466, Ls.2-3.) According to the district court, "The topic was specifically gone into in the defendant's case-in-chief in response to Mr. Verharen's questions of Mr. Joy, and it was very direct." (Tr., p.466, Ls.3-6.) The district court noted the evidence of the back injury could have come in on redirect. (Tr., p.466, Ls.13-15.) But the district court was "simply unable to understand how it would be appropriate surrebuttal to the issues raised by Michael Hart. It's not a new matter raised by Mr. Hart. It's a matter that always existed, and the appropriate place to go into it was on the defendant's case-in-chief." (Tr., p.466, Ls.15-20.)

Mr. Joy asserts that the district court abused its discretion when it excluded the evidence of his back injury, because the evidence was admissible as surrebuttal evidence. The district court abused its discretion when it determined that surrebuttal

evidence is limited to that which could not have been presented during a party's case in chief, because it did not act consistently with the applicable legal standard.

B. Standard Of Review And Applicable Law

The Idaho Supreme Court recently applied the standards for rebuttal evidence to surrebuttal evidence. *State v. Moses*, 156 Idaho 855, 866-67 (2014). "Rebuttal evidence is evidence which explains, repels, counteracts or disproves evidence which has been introduced by or on behalf of the adverse party." *Id.* at 867 (internal quotation marks omitted). "The mere fact that testimony might well have been presented during a party's case in chief does not, by itself, make it inadmissible for rebuttal." *Id.* (quoting *State v. Rosencratz*, 110 Idaho 124, 129 (Ct. App. 1986)) (internal quotation marks and alteration omitted). In *Moses*, "the State presented [defense witness] Branam's prior inconsistent statements for the purpose of attacking Branam's credibility. Because Moses' proffered surrebuttal evidence was offered to bolster Branam's credibility, thereby counteracting the State's rebuttal evidence that attacked Branam's credibility, it was within the scope of permissible surrebuttal." *Id.*

Considering the *Moses* Court applied the standards for rebuttal evidence to surrebuttal evidence, it appears that a district court's decision to allow or deny surrebuttal evidence is reviewed for an abuse of discretion. See *State v. Lewis*, 126 Idaho 77, 82 (1994) ("Decisions regarding admission of rebuttal evidence are reversed only for abuse of discretion."). When considering a claimed abuse of discretion, an appellate court applies a three-factor test focusing on: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of its discretion and consistent with the legal standards applicable to the

specific choices before it; and (3) whether the trial court reached its decision by an exercise of reason. *Schoger v. State*, 148 Idaho 622, 627 (2010).

C. The District Court Abused Its Discretion When It Excluded The Surrebuttal Evidence Of Mr. Joy's Back Injury

Mr. Joy asserts that the district court abused its discretion when it excluded his proffered surrebuttal evidence on his back injury, because it did not act consistently with the applicable legal standards. Under the standards for surrebuttal evidence articulated by the *Moses* Court, the district court should not have excluded the surrebuttal evidence of Mr. Joy's back injury. Even though Mr. Joy could have presented the evidence during his case in chief, the mere fact that he did not did not necessary make it inadmissible for surrebuttal. See *Moses*, 156 Idaho at 867.

Mr. Joy's proffered surrebuttal evidence on his back injury was offered to show that Mr. Joy had injuries when he was booked into jail, thereby counteracting the State's rebuttal evidence that he did not have any injuries when he was booked. (See Tr., p.463, L.16 – p.464, L.1.) Further, it was offered to bolster Mr. Joy's credibility with respect to his statements on having injuries, after the State offered Deputy Hart's rebuttal evidence to attack Mr. Joy's credibility on that point. (See Tr., p.464, Ls.1-6.) Thus, the evidence was within the scope of permissible surrebuttal. See *Moses*, 156 Idaho at 867. The district court therefore abused its discretion when it excluded the surrebuttal evidence, because it did not act consistently with the applicable legal standards.

D. The State Will Be Unable To Prove, Beyond A Reasonable Doubt, That The Exclusion Of The Surrebuttal Evidence Was Harmless

Mr. Joy asserts that the State will be unable to prove, beyond a reasonable doubt, that the district court's exclusion of the proffered surrebutal evidence was harmless. Where alleged error is followed by a contemporaneous objection and the appellant shows that a violation occurred, the State bears the burden of proving the error was harmless beyond a reasonable doubt, based upon the test articulated by the United States Supreme Court in *Chapman v. California*, 386 U.S. 18 (1967). See *State v. Perry*, 150 Idaho 209, 227 (2010). "To hold an error as harmless, an appellate court must declare a belief, beyond a reasonable doubt, that there was no reasonable possibility that such evidence complained of contributed to the conviction." *State v. Sharp*, 101 Idaho 498, 507 (1980) (citing *Chapman*, 386 U.S. at 24).

The State will be unable to prove, beyond a reasonable doubt, that the district court's exclusion of Mr. Joy's surrebuttal evidence did not contribute to the conviction. This case depended in no small part on whether the jury found Mr. Joy or Mrs. Joy more credible. For example, the State made the following characterization of this case during its closing reply argument: "The main thrust of the defense in this case are the inconsistent statements of Jennifer Joy to Deputy Ellis." (Tr., p.542, Ls.13-15.) Indeed, Mr. Joy, during his closing argument, emphasized that Mrs. Joy's account of the altercation was "clearly developing; it's changing over time." (See Tr., p.516, Ls.3-24.) The State in turn argued that Mr. Joy had a motive to lie and that what he had said occurred was implausible. (See Tr., p.492, L.1 – p.496, L.8.)

The jury did not find Mrs. Joy more credible than Mr. Joy across the board, considering they convicted him for domestic battery while acquitting him of kidnapping. (See R., pp.294-95.) The surrebuttal evidence would have bolstered Mr. Joy's

credibility by lending support to his statements that he actually had injuries as a result of the altercation, see *Moses*, 156 Idaho at 867, which could have tipped the jury's credibility determination further against Mrs. Joy and in favor of Mr. Joy. Thus, the State will be unable to prove, beyond a reasonable doubt, that this error was harmless.

Because the district court abused its discretion in excluding Mr. Joy's surrebuttal evidence, his conviction should be vacated and his case should be remanded for a new trial where the admissibility of the surrebuttal evidence can be determined under the applicable legal standard.

III.

The District Court Erred When It Failed To Give The Jury A Unanimity Instruction

A. Introduction

Mr. Joy asserts that the district court erred when it failed to give the jury a unanimity instruction. The district court instructed the jury that their verdict must be unanimous. (R., p.327.) However, under the facts and circumstances of this case, the district court was required to instruct the jury that they must be unanimous in their determination of which of the alleged batteries constituted the necessary element of the domestic battery offense charged. Although Mr. Joy did not contemporaneously object to the district court's failure to give a unanimity instruction, this Court may review this issue under the fundamental error doctrine.

B. Standard Of Review And Applicable Law

An appellate court exercises free review over whether a jury was given proper instructions. *Severson*, 147 Idaho at 710. Generally, "An error in jury instructions only constitutes reversible error when the instruction misled the jury or prejudiced the party

challenging the instruction.” *Id.* If the instructions, considered as a whole, fairly and adequately present the issues and state the applicable law, then no error has been committed. *Id.*

Mr. Joy did not make a contemporaneous objection to the district court’s failure to give a unanimity instruction during the trial. (See Tr., p.469, L.9 – p.470, L.25.) However, even without a contemporaneous objection at trial, claims of instructional error may be reviewed for the first time on appeal under the fundamental error doctrine. See *State v. Anderson*, 144 Idaho 743, 748-49 (2007); *State v. Hansen*, 148 Idaho 442, 444 (Ct. App. 2009). Under the fundamental error doctrine, Mr. Joy must show that (1) the alleged error violates one or more of his unwaived constitutional rights, (2) the alleged error is clear or obvious without the need for reference to any additional information not contained in the appellate record, and (3) there is a reasonable possibility that the alleged error affected the outcome of the trial proceedings. *State v. Perry*, 150 Idaho 209, 226 (2010).

C. The Court May Review The District Court’s Failure To Give A Unanimity Instruction Under The Fundamental Error Doctrine

This Court may review the district court’s failure to give a unanimity instruction under the fundamental error doctrine. Mr. Joy’s unwaived constitutional right to due process was violated by the failure to give a unanimity instruction. Jurors must be instructed on all of the matters of law necessary for their consideration, including “instructions on rules of law that are ‘material to the determination of a defendant’s guilt or innocence.’” *Severson*, 147 Idaho at 710 (citing I.C. § 19-2132) (quoting *State v. Mack*, 132 Idaho 480, 483 (Ct. App. 1999)). Under Idaho law, a trial court must instruct the jury that they must unanimously agree on the defendant’s guilt for the defendant to

be convicted. Idaho Const. art. I § 7; I.C. §§ 19-2316 & 19-2317; *Severson*, 147 Idaho at 711. However, “An instruction that the jury must unanimously agree on the facts giving rise to the offense . . . is generally not required.” *Severson*, 147 Idaho at 711 (citing *Schad v. Arizona*, 501 U.S. 624, 631 (1991); *State v. Nunez*, 133 Idaho 13, 19 (1999)). Still, due process bars states from convicting a person for a violation of a generic category of “crime” based upon any combination of facts the state sees fit to allege. *Schad*, 501 U.S. at 633.

“An instruction informing the jury that it must unanimously agree on the specific occurrence giving rise to the offense is necessary, however, when the defendant commits several acts, each of which would independently support a conviction for the crime charged.” *Severson*, 147 Idaho at 711 (citing *State v. Gain*, 140 Idaho 170, 172-73 (Ct. App. 2004); *State v. Montoya*, 140 Idaho 160, 167-68 (Ct. App. 2004); *Miller v. State*, 135 Idaho 261 (Ct. App. 2000)). In such a situation, “the trial court must instruct the jury that it must unanimously agree on the specific incident constituting the offense in each count, regardless of whether the defendant requests such an instruction. *Gain*, 140 Idaho at 172-73. Alternatively, jury unanimity may be protected by the State’s election of the incident upon which it will rely for the conviction. *Id.* at 173.

Mr. Joy’s right to due process was clearly violated here, because he allegedly committed several acts, each of which would independently support a conviction for the charged domestic battery offense. Whether a course of criminal conduct constitutes a single or multiple acts requires an inquiry into the circumstances of the conduct and consideration of the intent and objective of the actor. *State v. Bush*, 131 Idaho 22, 33-34 (1997); *State v. Major*, 111 Idaho 410, 414 (1986). For this inquiry, an appellate court asks whether there was “a distinct union of *mens rea* and *actus reus* separated by

a discrete period of time and circumstances from any other such similar incident” for each of the alleged acts. *Miller*, 135 Idaho at 268; see *Severson*, 147 Idaho at 711-12.

An inquiry into the circumstances of the conduct here reveals that there were multiple acts committed on the day of the altercation. Even in light of Mrs. Joy’s testimony, at least two discrete acts occurred. Mrs. Joy testified that, after she argued with Mr. Joy for about half an hour, Mr. Joy pushed her into the master bedroom’s bathtub, which was full of cold water. (Tr., p.208, L.21 – p.209, L.20.) She testified that she pushed her head into the water, pulled her hair, and hit her in the face. (Tr., p.209, L.21 – p.211, L.12.) She also testified that he then drained the water, took off her clothes, and tied her wrists and left ankle. (Tr., p.211, L.17 – p.212, L.18.) He pushed her over and tied her left ankle to her wrist. (Tr., p.213, Ls.1-4.)

Mrs. Joy testified that she had bloody lips from when Mr. Joy shoved a towel in her mouth when he was dunking her head under the water, and bruising on her legs. (Tr., p.228, L.9 – p.230, L.6.) She testified on cross-examination that she had previously testified that after Mr. Joy removed her clothes, he left the bathroom and came back with a washcloth. (Tr., p.252, Ls.3-16.) The detail that Mr. Joy left the bathroom and came later suggests a temporal separation between what allegedly occurred before he left the bathroom and what happened after. See *Miller*, 135 Idaho at 268.

Even if the events in the bathroom are all part of a single act, those events are still separated temporally and spatially from what allegedly happened in Mr. Joy’s truck. Mrs. Joy testified that Mr. Joy dragged her from the bedroom outside to his truck, hit and kicked her, and took her to the back of the property. (Tr., p.213, L.14 – p.216, L.12.) When he stopped the truck, he pulled her hair, hit and kicked her, and told her

that he would tie her to a tree if she did not tell him where his keys and phone were. (Tr., p.217, L.13 – p.218, L.22.) When she told him, he calmed down, took her back to the house, and went to sleep. (Tr., p.220, Ls.3-19.) Because the events in the truck are removed in time and place from the earlier occurrences, the events in the truck are “separated by a discrete period of time and circumstances” from the events in the bathroom. See *Miller*, 135 Idaho at 268; see also *State v. Moad*, 156 Idaho 654, 660-61 (Ct. App. 2014) (holding, in a double jeopardy case, that male rape and battery with intent to commit a serious felony offenses were separate and independent, where the defendant orally raped the victim and then beat the victim, moved him a few feet, and continued the battery: “The battery was an additional brutalization of the victim that occurred after the rape was completed”). Thus, they constitute separate acts.

Further, considering Mr. Joy’s alleged intent and objective suggests that there was evidence of multiple acts. Mrs. Joy testified that she and Mr. Joy had been arguing about his texting his ex-girlfriend before the events in the bathroom. (Tr., p.208, Ls.3-13.) However, after Mr. Joy dragged her to the truck and took her to the back of the property, his focus had changed to having her tell him where his keys and phone were. (See Tr., p.217, L.13 – p.218, L.22.) Thus, Mr. Joy’s alleged intent and objective in the bathroom and his alleged intent and objective in the truck were different, which indicates there were multiple acts. See *Bush*, 131 Idaho at 33-34; *Major*, 111 Idaho at 414.

In short, even in light of Mrs. Joy’s testimony, there was evidence that Mr. Joy allegedly committed several acts, each of which would independently support a conviction for the charged domestic battery offense. Because the evidence in the appellate record indicates that Mr. Joy committed at least two acts that would each

alone support a conviction, his due process right to a unanimity instruction under these circumstances was clearly violated.

Mr. Joy also asserts that there is a reasonable probability that the clear error here contributed to the jury verdict. The jury here found Mr. Joy guilty of domestic battery, but acquitted him of kidnapping. (R., pp.294-295). Thus, the jury did not find Mrs. Joy's testimony more credible than Mr. Joy's testimony across the board. Cf. *Montoya*, 140 Idaho at 168 (noting, in a case involving whether the failure to give a unanimity instruction was reversible error, that by finding the defendant guilty, "the jury obviously found [the victim's] testimony more credible than [the defendant's]").

Further, Mr. Joy contradicted Mrs. Joy's testimony with a different version of events. (See generally R., p.339, L.14 – p.443, L.14.) Because the jury did not find Mrs. Joy's testimony more credible across the board, and because Mr. Joy contradicted her testimony with a different version of events, the jury could have believed some of the events alleged by Mrs. Joy with respect to the domestic battery offense, but not others. Cf. *Montoya*, 140 Idaho at 168 ("Because [the defendant] did not contradict [the victim's] testimony with a different version of events, there is no reason for this Court to conclude that the jury would have believed some of the incidents alleged by [the victim], but not others.") Because the jury returned a general verdict (see R., pp.294-295), there is no way to tell how many jurors believed Mrs. Joy's testimony on the events in the bathroom while not believing her testimony on the events in the truck, or vice versa. Put otherwise, it is impossible to tell whether the jury correctly reached its verdict unanimously, or incorrectly reached its verdict based upon divergent theories. Thus, there is a reasonable probability that the failure to give a unanimity instruction contributed to the verdict.

In sum, the district court erred when it failed to give a unanimity instruction requiring the jury to reach a unanimous decision regarding what acts Mr. Joy committed resulting in his conviction for domestic battery. Thus, Mr. Joy's conviction should be vacated and the case remanded to the district court. See *State v. Luke*, 134 Idaho 294, 301 (2000).

CONCLUSION

For the above reasons, Mr. Joy respectfully requests that this Court vacate his conviction for domestic battery and dismiss the charge. Alternatively, Mr. Joy respectfully requests that this Court vacate his conviction and remand his case to the district court for further proceedings.

DATED this 13th day of April, 2015.


BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13th day of April, 2015, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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